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No. 87-1661

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ASARCO INCORPORATED, CAN-AM CORPORATION, MAGMA COPPER COMPANY, and JAMES P.L. SULLIVAN,
Petitioners,

v.

FRANK and LORAIN KADISH, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

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SUPPLEMENTAL BRIEF FOR PETITIONERS

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This brief responds to the brief filed by the Solicitor General for the United States as amicus curiae. While the Solicitor General concludes that the petition for a writ of certiorari should be denied, the considerations advanced in support of that conclusion serve to confirm that, to the contrary, this Court should review at this time the decision of the Arizona Supreme Court on an important issue of federal-state relations.

Standing. The Solicitor General first suggests that the respondents, who initiated this litigation and prevailed in the court below, do not satisfy the standing requirement

of Article III and that accordingly this Court is constitutionally barred from reviewing, at the behest of the petitioners, a decision in favor of the respondents by which the petitioners are unquestionably aggrieved. The Solicitor General is wrong in his description of the interests of the respondents; he is wrong in asserting that their interests do not satisfy the standing requirements of Article III. And, if he were right on those points, he would be wrong in assuring the Court that the perverse consequence must be to decline review and let stand, for want of a plaintiff's Article III standing, a decision of a state court on a federal issue by which the party seeking review is unquestionably aggrieved.

The plaintiffs in this case are named taxpayers and the Arizona Education Association, representing its 20,000 members who are teachers in the Arizona public schools. The taxpayer plaintiffs alleged in the complaint that they pay property taxes that are used to support public education and that the Arizona formula for mineral leases that they challenge has "deprived the school trust funds of millions of dollars thereby resulting in unnecessarily higher taxes." (Complaint ¶ III.) The position of these taxpayers is thus far from that of the taxpayer plaintiff in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952), the only case the Solicitor General cites in which this Court has dismissed for want of jurisdiction an appeal from a decision in a state taxpayer's suit. The plaintiff in *Doremus*, complaining of a statute providing for the reading of verses from the Old Testament in public school, made "no allegation that this activity is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the costs of conducting the school." *Id.* at 433.

The decision that the plaintiff in *Doremus* had no standing and his appeal must therefore be dismissed was not a broad decision that all state taxpayer suits are beyond this Court's power of review. It was a narrow decision based on the fact that "the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference." *Id.* at 434. The Court indeed said that a taxpayer's action can meet the Article III case-or-controversy test "when it is a good-faith pocketbook action." *Id.*

In this case the taxpayer plaintiffs alleged just the kind of direct dollars-and-cents injury necessary to make their case a good-faith pocketbook action that qualifies as a case or controversy under Article III. The allegation of their complaint is that they are paying higher taxes as a direct consequence of the governmental action they challenge. They are like the plaintiff in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), where the Court found a justiciable controversy. As the Court explained in *Doremus*, the plaintiff in *Everson* "showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of," the spending of public funds for transportation of parochial school students. 342 U.S. at 434.

True enough, many, probably most, potential federal taxpayer suits are outside of Article III under this Court's current doctrine. But the leading opinions establishing the no-standing doctrine and its limits make clear that they deal only with federal taxpayers. *See Massachusetts* v. *Mellon*, 262 U.S. 447, 486-87 (1923); *Flast* v. *Cohen*, 392 U.S. 83, 101, 102, 104, 105-06 (1968). *Doremus*'s placement of the state taxpayer's "good-faith pocketbook action" within Article III has never been questioned by the Court. And *Everson* has been cited by the Court (along with cases decided since *Flast* v. *Cohen*) as among "the numerous cases in which we have adjudicated Establishment Clause challenges by state taxpayers to programs for aiding nonpublic schools." *School District of the City of Grand Rapids* v. *Ball*, 473 U.S. 373, 380 n.5 (1985).

All of this is aside from the separate interest of the members of the plaintiff Arizona Education Association. The Solicitor General misconceives both their grievance and the likelihood of its being remedied by their lawsuit. The federal statute that is at the heart of this lawsuit provides that all revenue obtained from lands granted by the federal government be dedicated to the support of the Arizona school system. The 20,000 teacher members of the Association unquestionably have a direct and personal interest in the welfare of that system. The injury they claim from the alleged disregard of the federal statute does include an adverse economic impact on them as the Solicitor General quotes from the complaint. (S.G. Br. 9-10.) That is certainly an acceptable allegation of direct injury. The complaint alleges also that the "quality of education in Arizona" has been adversely affected by the failure to follow the Association's view of what federal law requires. (Complaint ¶ IV.) These allegations on behalf of the Association members satisfy the constitutional "core component" of the standing requirement, *i.e.*, that "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U.S. 737, 751 (1984).

The injury is plain enough. The likelihood of redress is present also, contrary to what the Solicitor General says. Experience shows that the availability of additional financial support will enhance the quality of education through increased teacher salaries and otherwise. Nothing in the law of standing requires the respondents to provide a detailed blueprint of how the enhancement would come about and precisely how it would benefit them as the price of their admission to the courthouse.

There is no question that this has been a sharply and vigorously contested lawsuit. Both sides believed that they were asking the Arizona courts to resolve a genuine dispute, and those courts would be surprised to learn

that they had rendered a mere advisory opinion, even one that is advisory "for Article III purposes" only. (S.G. Br. 10.) The decision, if not reviewed here now, will surely be accorded dispositive effect by those courts and is likely to prompt a conforming amendment to the Arizona leasing statute, codifying in state law an erroneous interpretation of federal law and thereby mooting the petitioners' case. Moreover, any effort by the petitioners at some time in the future in a federal court to relitigate the issue decided by the court below would be at best an uphill battle. Because the petitioners have had a full and fair opportunity to present their contentions, collateral estoppel or issue preclusion will surely be argued as a bar to relitigation. *Cf. Federated Department Stores* v. *Moitie*, 452 U.S. 394 (1981).

Against all this, the Solicitor General offers only a comment of the Court in *Doremus*: "we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute" a case or controversy. 342 U.S. at 434 (S.G. Br. 10). There has never been occasion for the Court to expand upon this remark, which was made in the context of a case in which a plaintiff who lacked Article III standing had lost on the merits in the state courts. Eminent authority, as the Solicitor General recognizes (S.G. Br. 11 n.4), considers it reasonable to believe that the Court meant that, while dismissing the appeal of that plaintiff, it would vacate the judgment below in such a case as the Solicitor General hypothesizes this one to be, where the plaintiff without standing has prevailed on the merits, to prevent a state court's disposition of the federal issue from being conclusive. The Solicitor General says he disagrees and thinks the Court meant only that it would not consider itself concluded by an unreviewed decision and would review a subsequent decision rendered in a constitutional case or controversy, if the non-prevailing party could contrive

to obtain one. That is small solace to such a party, especially when, as we have said, the whole issue may be concluded by conforming legislative action. The question what the rule should be is a significant one.

In the circumstances, if the Court believes that there is anything to the Solicitor General's standing argument, it should invite the parties to brief and argue the standing issues, in addition to the merits, on plenary review of the decision below.

Ripeness. The Solicitor General says that review of the Arizona decision by this Court at this time would be premature. (S.G. Br. 11-12.) The statement is made by way of an addendum to the standing argument and is apparently *not* offered as an argument that the decision below is not final and therefore beyond the Court's jurisdiction. Contrary to the Solicitor General's assertion, it is clear that the petitioners will suffer injury if the decision below stands. The Arizona Supreme Court has held unequivocally that the statute pursuant to which the terms of the petitioners' mineral leases are set is "unconstitutional and invalid" and has instructed the trial court to enter judgment to that effect. (App. 29a.) Thus the law pursuant to which the petitioners assert rights as lessees has been unqualifiedly set aside; if the petitioners' view of that law is correct, they have surely suffered injury in fact and in law.

The question on which the trial court has been instructed to take evidence "if appropriate" is not the validity of the governing state statute; that question, as we have shown, is resolved. The permissible taking of evidence, on which the Solicitor General mistakenly relies in urging prematurity (S.G. Br. 12), relates entirely to "special action relief" which the respondents sought from the trial court. The petition does not seek review of any such relief. The case is not brought here prematurely.

The Merits. In giving his blessing to the decision of the Supreme Court of Arizona the Solicitor General essen-

tially restates the reasons advanced by that court and urged by the respondents.

All but ignored in his analysis is the Act of 1927, the Jones Act, by which for the first time lands known to be mineral-bearing were conveyed to the western states, including Arizona. By that statute, states were forbidden to sell the minerals or the right to prospect for, mine, and remove them; all sales of mineral-bearing lands must reserve to the state the mineral deposits and prospecting and mining rights. It was unquestionably the ability of Arizona to dispose in fee of the non-mineral bearing lands granted it by the Enabling Act of 1910 that gave rise to the appraisal, advertisement and auction limitations that Congress imposed in that act. When mineral lands were first granted to the state some seventeen years later, no such limitations were imposed on the state and there is no evidence they were considered necessary. Instead, the statute authorized Arizona and the other states to lease the mineral deposits in the newly granted mineral-bearing lands "as the State legislature may direct." The requirement that the state retain title to the minerals in mineral-bearing lands made unnecessary the specific limitations of the Enabling Act designed to protect against improvident sales. There was never any "sad experience" in the utilization of mineral lands by the states such as led the Congress to impose limitations with respect to non-mineral lands where there had been "dissipation of the funds by one device or another." (S.G. Br. 4.)

The Solicitor General, as we have said, disdains the Jones Act with its specific provision that mineral deposits may be leased as the state legislature may direct. He quotes the comparable phrase in Section 28 of the Enabling Act as it was amended in 1936 to make the treatment of lands that had passed to Arizona under the Enabling Act because their mineral-bearing nature was unknown accord with the treatment of the known mineral-

bearing lands granted to the state by the 1927 act. He says that phrase—"in such manner as the Legislature of the State of Arizona may prescribe"—can reasonably be read merely "as authorizing the legislature to set lease terms not in conflict with the express terms of the Enabling Act." (S.G. Br. 12.) That is not a sensible reading even of the Enabling Act phrase. The phrase is a part of a sentence that states, "Nothing herein contained shall prevent," among other things, the leasing of lands for their mineral deposits in such a way as the legislature prescribes. It is hard to imagine a clearer direction that the express terms "herein contained"—the appraisal, fair value and auction terms contained in the Enabling Act and specifically in Section 28—do not qualify the legislature's authority to lease mineral deposits as its own view of sensible policy dictates.

So far as the comparable phrase in the Jones Act is concerned, the Solicitor General's argument is not plausible. In the same sentence of the Jones Act by which Congress authorized each grantee state to lease mineral deposits "as the State legislature may direct," it directed that the proceeds of the leases be used "for the support or in aid of the common or public schools." No such direction as that would have been necessary had Congress not thought itself to be enacting a self-contained regime for state leases of the newly granted mineral deposits. For the Arizona Enabling Act and the enabling act of other states affected by the Jones Act already specified that proceeds of the disposition of the lands granted to the new states must be used to support the public schools.

The Conflicting Decision. In *Jensen* v. *Dinehart*, 645 P.2d 32, 35 (Utah 1982), the Utah Supreme Court held that the Utah legislature could, under the terms of the Jones Act, direct that the proceeds of leases of mineral deposits be used for current school support. The Utah Enabling Act required that proceeds of sales or

other dispositions of federally granted lands go into a fund, interest on which only could be used currently for school support. The Solicitor General acknowledges "tension" between that decision and the decision below (S.G. Br. 14) but denies a square conflict (*id.* at 8) apparently because the Utah case concerned the effect of the Jones Act on restrictions in the Utah Enabling Act and this case concerns the effect of the Jones Act on restrictions in a section of the New Mexico-Arizona Enabling Act. That is not the kind of distinction that makes a conflict of decisions less than a square conflict. The conflict should be resolved and the important question of federal law on which the highest courts of two states differ decided by this Court.

The Arizona Constitution. The Solicitor General ends on a note of high speculation: Even if the Jones Act did give the State of Arizona leasing powers free of the Enabling Act's restrictions, as the petitioners contend, review is not warranted, he suggests, because the state court may ultimately determine that those same restrictions are imposed by the Arizona State Constitution. (S.G. Br. 15.)

He does not contend that the decision below rests on an adequate independent state ground so as to deprive this Court of jurisdiction; he acknowledges that the decision rests primarily on federal law. (S.G. Br. 15 n.9.) (In fact, the decision plainly rests exclusively on an interpretation of federal laws.) He points out, however, that in a totally unrelated case decided earlier this summer, which involved neither leasing nor mineral lands, the Arizona Supreme Court held that, even though the Enabling Act did not require advertising and auction when the state condemned granted lands, the identical language in the Arizona Constitution did impose such requirements. *Deer Valley Unified School District No. 97* v. *Superior Court*, No. CV-86-0577-T (Ariz. S. Ct. June 30, 1988).

The Solicitor General appears to be suggesting that, even though the decision below rested on federal law, it might be regarded, because of *Deer Valley*, as reflecting the requirements of the Arizona Constitution. The court below, however, did not find any difference between the requirements of the Enabling Act, as amended, with respect to mineral leases and the requirements of the rescripted Arizona Constitution, and differences are just what it did find in *Deer Valley*. The Arizona Supreme Court gave no hint in this case that, if disabused of an error in its reading of the federal law, it would adhere to its reading of the nearly identical provision of the Arizona Constitution. Its decision, therefore, is an application of federal law and should be reviewed as such regardless of speculation that the Arizona courts might do something on remand that they have not suggested they would do.

CONCLUSION

The decision of the court below warrants plenary review by this Court.

Respectfully submitted,

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